UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, *et al.*	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 1:13-cv-01612-WTL-TAB
	)	
INTERNAL REVENUE SERVICE, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

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Introduction

The Affordable Care Act ("ACA") provides for premium tax credits that will assist millions of Americans in the purchase of health insurance on the newly-created Exchanges. 26 U.S.C. § 36B. The plaintiffs here, the State of Indiana and several Indiana school districts, seek to deprive Indiana residents of the benefit of these federal tax credits. They claim that the ACA does not provide for tax credits for participants in federally-facilitated Exchanges, such as the Exchange that operates in the State of Indiana. Their reading of the Act is incorrect. "[T]he plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges." *Halbig v. Sebelius*, --- F. Supp. 2d ---, 2014 WL 129023, at *18 (D.D.C. Jan. 15, 2014), *appeal docketed*, No. 14-5018 (D.C. Cir. Jan. 16, 2014); *see also King v. Sebelius*, --- F. Supp. 2d ---, 2014 WL 637365, at *11 (E.D. Va. Feb. 18, 2014), *appeal docketed*, No. 14-1158 (4th Cir. Feb. 21, 2014) ("when statutory context is taken into account, Plaintiffs' position is revealed as implausible"). The Treasury Department, accordingly, has reasonably interpreted the Act to provide for eligibility for the premium tax credits for individuals in every state, regardless of which entity operates the Exchange.

This case, however, is not the appropriate forum to address this question. The plaintiffs' claims are not justiciable, as confirmed by their opposition briefs. First, the plaintiffs lack Article III standing to proceed with their challenge to the Treasury regulation. Indiana asserts that it has standing as a sovereign state to litigate its policy disagreements with the federal government concerning the ACA. Indiana's mere disagreement with the federal government's reading of federal law, however, states only a generalized grievance, not an injury-in-fact. The

plaintiffs also claim standing in their capacity as employers, because they may be liable for the ACA's tax assessment for large employers that fail to offer adequate coverage for their full-time employees, 26 U.S.C. § 4980H, if one or more of their employees obtain the tax credit. But the plaintiffs' employees are not parties to this lawsuit, and thus this lawsuit could not resolve the employees' eligibility for the tax credit. The plaintiffs thus cannot gain redress for their supposed injuries in this action.

Additional threshold barriers preclude this Court from accepting the plaintiffs' invitation to increase the federal tax liabilities of the Indiana residents who are absent from this litigation. Under settled principles of tax law, the plaintiffs lack prudential standing to seek to impose this tax burden on absent third parties. The plaintiffs, surprisingly, deny that these principles exist, but, as explained below, their argument on this score turns on a material misquotation of Supreme Court precedent. The proper application of that precedent dictates the dismissal of this claim. In addition, insofar as the plaintiffs seek to determine their own potential liability for the Section 4980H tax, Congress has specified the right forum for such a claim – an action for a tax refund. Such an action would afford the plaintiffs an adequate remedy, and so the plaintiffs must pursue their claim in that forum, not in this APA action.

This Court should also reject the plaintiffs' attempt to revive the Tenth Amendment challenge to certain provisions in the ACA that Indiana has already unsuccessfully pursued. The defendants have shown that the challenge fails on the merits under cases such as *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and that the challenge also fails under principles of claim and issue preclusion. In their opposition to the motion to dismiss, the plaintiffs fail entirely to defend their Tenth Amendment claims on the merits, and so

those claims are waived. In any event, because Indiana litigated precisely the same claims in a prior action, and lost on the merits, it is barred from relitigating those claims here. The school districts are in privity with Indiana for the purposes of these claims, and are barred as well.

Last, the plaintiffs seek a declaration of "judicial estoppel" that would bind the federal government to its published statements that Section 4980H and a tax reporting provision for large employers, 26 U.S.C. § 6056, will not be applied in 2014. Treasury has announced repeatedly, however – seventeen times in recently published final regulations, for example – that those provisions will not be so applied. The plaintiffs do not state any case or controversy by asking the Court to direct the defendants to make an eighteenth announcement to the same effect.

Argument

I. The Plaintiffs' Challenge to the Treasury Regulation Is Not Justiciable (Count I)

A. Indiana Does Not Have Standing as a Sovereign to Seek to Deprive Its Residents of Federal Tax Credits

Indiana has asserted that it has standing as a sovereign to litigate its residents' eligibility for federal tax credits under 26 U.S.C. § 36B. *See* Am. Compl., ¶ 18, ECF 22. As the defendants have shown in their motion to dismiss, however, longstanding principles governing *parens patriae* standing prohibit Indiana from suing the federal government to adjudicate its residents' rights and obligations under federal law. *See, e.g., Illinois Dep't of Transp. v. Hinson*, 122 F.3d 370, 373 (7th Cir. 1997); *Michigan v. EPA*, 581 F.3d 524, 529 (7th Cir. 2009).

Indiana protests that it does not mean to bring a *parens patriae* claim, and that it instead asserts its own "sovereign rights" to express its policy preferences as to whether its residents should be eligible for valuable federal tax credits. Indiana's Response in Opp. to Mot. to Dismiss Am. Compl. ("Indiana Opp.") at 12, ECF 38. But this is merely a claim of *parens*

patriae standing by another name. It is settled that "it is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982); *Virginia v. Sebelius*, 656 F.3d 253, 271 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 59 (2012). The mere fact that Indiana disagrees with the federal government's reading of federal tax law does not give the state standing; "such a generalized grievance, no matter how sincere, is insufficient to confer standing." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). *See also Virginia v. Sebelius*, 656 F.3d at 271 ("To permit a state to litigate whenever it enacts a statute declaring its opposition to federal law … would convert the federal judiciary into a forum for the vindication of a state's generalized grievances about the conduct of government.") (internal quotation omitted).

Indiana cites to cases such as *New York v. United States*, 505 U.S. 144 (1992), as examples of circumstances in which a state had standing to litigate the validity of federal law. Indiana Opp. 13, 15. But in each of the cases that Indiana cites, the state had standing because its own regulatory activities were at stake. New York had standing, for example, because the challenged federal law would have required the state to enact legislation. Here, in contrast, Indiana does not allege (apart from its claim, discussed separately below, that it is potentially subject to a federal tax as an employer) that its own activities are affected in any way by the federal government's administration of federal tax credits for Indiana residents. It only alleges that it disagrees with the federal government's interpretation of federal law. But "[t]here is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional sense are

they susceptible of judicial determination." *United States v. West Virginia*, 295 U.S. 463, 474 (1935).

In short, "only when a federal law interferes with a state's exercise of its sovereign power to create and enforce a legal code does it inflict on the state the requisite injury-in-fact." *Virginia*, 656 F.3d at 269 (internal quotation omitted). There is no such interference with state law here; Indiana need not involve itself in any way in the federal government's administration of federal tax credits for Indiana residents. *See, e.g.*, *Illinois Dep't of Transp. v. Hinson*, 122 F.3d at 372-73 (state lacked cognizable injury where ability to enforce statutes was not hindered).

Indiana also contends that Congress has granted it statutory standing to pursue its challenge to its residents' receipt of federal tax credits. Indiana Opp. 14 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)). It cites no statute granting it, or any other state, a cause of action to litigate its citizens' federal tax liabilities, and no such statute exists. In any event, Indiana's argument "misinterpret[s] *Lujan*." *State Nat'l Bank v. Lew*, 958 F. Supp. 2d 127, 142-43 (D.D.C. 2013) (rejecting similar theory of statutory standing). Although a statute can create legal rights, the invasion of which could give rise to standing, a plaintiff asserting such a statutory right must still possess an underlying "concrete, de facto injur[y]" to satisfy Article III. *Lujan*, 504 U.S. at 578. Indiana alleges no concrete, de facto injury merely by stating its belief that the federal government has misinterpreted federal law; "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984); *see also Oklahoma v. Sebelius* , 2013 WL 4052610, at *7 (E.D. Okla. Aug. 12, 2013) (rejecting identical claim

brought by another state, asserting sovereign standing to challenge the same Treasury regulation that is at issue here, as a "generalized grievance").[1]

B. The Plaintiffs Lack Standing as Employers to Challenge the Treasury Regulation

Indiana and the school districts fare no better in their claim of standing in their capacity as employers. They contend that they are "expose[d]" to the possibility of a tax assessment under Section 4980H if their full-time employees are eligible to receive the premium tax credit. Am. Compl., ¶ 179. As the defendants have explained, however, the amended complaint is devoid of any allegations as to whether any of the employer plaintiffs' full-time employees will obtain such credits on the Exchanges. They accordingly have not met their "substantially more difficult" burden to show standing in cases where the plaintiff's claim of injury turns on the actions of third parties. *DH2, Inc. v. SEC*, 422 F.3d 591, 596 (7th Cir. 2005). Moreover, in their amended complaint and in their filings in opposition to the motion to dismiss, the plaintiffs simply assert that they face liability for the Section 4980H tax if they do not offer coverage to part-time employees. Under the final regulations for Section 4980H, however, multiple considerations come into play before liability for the tax would be established. To cite only one example, the regulations limit the circumstances in which variable-hour employees would be determined to be "full-time employees" for purposes of the Section 4980H tax assessment. 26 C.F.R. §§ 54.4980H-3(d)(3), (d)(4). The plaintiffs acknowledge the existence of the final

[1] Indiana also invokes the "special solicitude" that is accorded to states in some circumstances in the standing analysis. Indiana Opp. 16 (citing *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)). But "nothing in the Court's opinion in *Massachusetts v. EPA* remotely suggests that states are somehow exempt from the burden of establishing a concrete and particularized injury in fact." *Texas v. EPA*, 726 F.3d 180, 199 (D.C. Cir. 2013) (internal quotation and alteration omitted).

regulations, but make no effort to demonstrate that they actually would face liability under those regulations. They thus do not show that an injury is "certainly impending" against them. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

In any event, the plaintiffs lack standing for a more fundamental reason. They contend that, as employers, their injury arises because they are "threatened" by Section 4980H, in that they may be assessed with the tax under that provision if they fail to offer adequate coverage to their full-time employees, if one or more of those employees receives a premium tax credit. Am. Compl., ¶ 172. But any injury that they would suffer from this "threat" would not be redressable in this action. The plaintiffs' employees, after all, would not be bound by any judgment in this action. *See Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (claim and issue preclusion ordinarily cannot apply to nonparties, given the "deep-rooted historic tradition that everyone should have his own day in court"). Thus, even if this Court were to attempt to award relief in the plaintiffs' favor, it could not prevent the plaintiffs' employees from seeking premium tax credits under 26 U.S.C. § 36B. And the "threat" to the plaintiffs of the large employer tax assessment under Section 4980H would follow, if such a credit is allowed or paid for at least one of the employer's full-time employees (and if the employer has failed to offer adequate coverage for those employees). *See* 26 U.S.C. § 4980H(a), (b).

Thus, the future conduct of the plaintiffs' employees would trigger the plaintiffs' claimed injury, no matter whether this Court purports to make a declaration of those employees' rights under the Internal Revenue Code in this case. A ruling in the plaintiffs' favor would "not effect any change in federal [tax] law that could bind nonparties." *Urban Health Care Coalition v. Sebelius*, 853 F. Supp. 2d 101, 108 (D.D.C. 2012). The plaintiffs accordingly lack standing to

pursue this action. *See also Lujan v. Defenders of Wildlife*, 504 U.S. at 569 (plurality opinion); *University Med. Ctr. of S. Nevada v. Shalala*, 173 F.3d 438, 441-42 (D.C. Cir. 1999); *Comite de Apoyo a los Trabajadores Agricolas v. U.S. Dep't of Labor*, 995 F.2d 510, 514 (4th Cir. 1993).

The plaintiffs contend that their injury would be redressed because, if they were to prevail here, the Treasury regulation that they challenge, 26 C.F.R. § 1.36B-1(k), would be vacated with nationwide effect. Indiana Opp. 10-11; School Corporations' Resp. to Mot. to Dismiss Am. Compl. ("School Corporations Opp.") 11, ECF 39.[2] In their view, the vacatur of the regulation would necessarily bind the plaintiffs' employees, because absent this regulation, there would be no basis for the employees to claim tax credits. *Id*. But this contention is incorrect; 26 C.F.R. § 1.36B-1(k) is an *interpretive* regulation, not a legislative regulation. Even if the rule announcing the Treasury Department's interpretation of the statute were to be invalidated, the employees could still bring their own claims advancing *their own* interpretation of the Affordable Care Act to provide for tax credits for individuals who purchase insurance on federally-facilitated Exchanges.

The plaintiffs, then, do not seek "the typical relief in an APA suit." Indiana Opp. 11. Instead, they are asking this Court to declare whether their employees may rely on a Treasury regulation when they later assert their right to tax credits under the Affordable Care Act. A ruling in this case, if it were to have any effect at all, could at most affect the level of deference that would be owed to Treasury's interpretation in the *next* case. This "two-step process … does not satisfy redressability." *Urban Health Care Coalition*, 853 F. Supp. 2d at 111. A

[2] This premise is, at best, highly debatable. *See Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743, 2761 (2010) (court should tailor relief to address injuries of plaintiffs before it). But this point is immaterial, because even the relief that the plaintiffs seek would not redress their injuries.

court opinion must fully resolve the issue before it, and not "merely determine a collateral legal issue governing certain aspects of … pending or future suits," in order to be justiciable. *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998).

The plaintiffs thus would remain under the "threat" of tax assessments under 26 U.S.C. § 4980H no matter what happens in this litigation, given that their employees could bring their own claims for premium tax credits, which would then trigger the plaintiffs' tax liabilities if they fail to provide adequate coverage to their full-time employees and their dependents. The plaintiffs' alleged injuries turn entirely on their response to this "threat" of liability. Am. Compl., ¶ 172. That fear of potential liability could not be redressed in this litigation, and thus the employer plaintiffs lack Article III standing.

C. The Plaintiffs Lack Prudential Standing to Seek to Adjudicate the Tax Liabilities of Absent Third Parties

It is a "well-established position" in the federal courts "that, ordinarily, one may not litigate the tax liability of another." *Women's Equity Action League v. Cavazos*, 879 F.2d 880, 885 n.3 (D.C. Cir. 1989) (R.B. Ginsburg, J.). The plaintiffs' claims directly violate this principle. Not only do the plaintiffs seek to litigate the federal tax liabilities of parties that are absent here, but they also seek relief that would purport to *increase* those absent parties' tax liabilities. Such relief is not permissible in this APA action, and the plaintiffs accordingly lack prudential standing.

Despite the wealth of precedent that reiterates this principle, *see, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976); *Am. Soc'y of Travel Agents v. Blumenthal*, 566 F.2d 145, 150 n.3 (D.C. Cir. 1977), Indiana denies that there is any prohibition at all against litigating third parties' tax liabilities. It quotes a passage in *Hibbs v. Winn*, 542 U.S. 88 (2004),

which recited that "numerous federal-court decisions – including decisions of [the Supreme] Court reviewing lower federal-court judgments – have reached the merits of third-party *constitutional* challenges to tax benefits without mentioning the TIA [Tax Injunction Act, 28 U.S.C. § 1341]." *Id.* at 110 (emphasis added). In its quotation, however, Indiana omits the word "constitutional," Indiana Opp. 19, thereby distorting the meaning of the passage. There is a basic distinction between the "run-of-the-mine tax case," alleging that a taxing agency exceeded its statutory authority, and a tax suit that "involve[s] [a] fundamental right or classification that attracts heightened judicial scrutiny," such as an Establishment Clause claim, or an Equal Protection claim of racial discrimination. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 430, 431 (2010). Ordinary prudential principles bar the former kind of challenge to a third party's tax assessments, even in cases where the latter claim might be permitted to proceed. *See id.* Each of the cases that Indiana cites for the proposition that third-party tax challenges may go forward is an Establishment Clause or racial discrimination case. *See* Indiana Opp. 19-20.[3] None of those cases provides any support for a challenge to absent parties' tax liabilities in a "run-of-the-mine" tax case that raises purely statutory claims, such as the plaintiffs' challenge to the Treasury regulation here.

This prudential principle applies with special force in cases involving federal tax liabilities. Congress has consistently legislated with the understanding that one party may not litigate another's federal tax liabilities, absent specific statutory authorization to do so. It is thus clear under the Internal Revenue Code that only the taxpayer may question his or her federal

[3] The one exception is the district court's decision in *Tax Analysts & Advocates v. Schultz*, 376 F. Supp. 889 (D.D.C. 1974). That court's holding as to prudential standing, however, was overruled by the D.C. Circuit's subsequent decision in *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 144 (D.C. Cir. 1977).

tax assessment, even where the challenge might affect another party's separate liability to the government. *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. IRS*, 845 F.2d 139, 144 (7th Cir. 1988) (precluding third-party challenge to federal tax assessment). Indiana responds that it is not bringing a quiet title action or any similar action under the Internal Revenue Code where Congress has authorized suits by non-taxpayers. Indiana Opp. 18 (citing, *e.g.*, 26 U.S.C. § 7426). This entirely misses the point. The point is that Congress would not have created such procedures, nor in doing so would it have re-affirmed the principle that only the taxpayer may question the assessment against him or her, if it had believed that the APA contains a general authorization for plaintiffs to question third parties' tax assessments. "[T]he statutory scheme created by Congress is inconsistent with, if not preclusive of, third party litigation" of tax claims. *Fulani v. Brady*, 935 F.2d 1324, 1327 (D.C. Cir. 1991).

Indiana also, oddly, denies that it is seeking the adjudication of any third parties' tax liabilities at all. As it puts the issue, it is merely challenging an IRS regulation, and "any impact on the tax liability of individual Hoosiers is incidental." Indiana Opp. 17. It acknowledges that the increase in the federal tax liabilities of many Indiana residents "may be an unfortunate incidental impact of the case," although it denies that it hopes for this result: "that is not the same as making an increase in the tax liability of Hoosier workers the objective of the lawsuit." Indiana Opp. 18. Indiana, however, directly (but wrongly) alleges in its complaint that the Treasury regulation is "contrary to law" because it "authorize[es] federal premium-assistance subsidies [*i.e.*, tax credits] to individuals who do not qualify under the statute," *i.e.*, Indiana residents, in the state's (incorrect) reading of the ACA. Am. Compl., ¶ 200. Indiana also directly asks for relief that would prohibit the distribution of these tax

credits. Am. Compl., p. 67. Whether Indiana is saddened or not by the harm that its complaint aims to inflict on its own residents is beside the point. The point is that Indiana's complaint asks this Court to determine that absent third parties are not eligible for valuable federal tax relief; prudential principles strongly dictate that this Court should not accept the invitation to do so.

Indiana also asserts that prudential principles counsel in favor of permitting its suit to go forward. Indiana Opp. 21. But the very point of the prudential principle against third-party tax challenges is that relief like what Indiana seeks here would throw the process of tax administration into disarray. Indiana seeks to impose *additional* federal tax obligations on absent parties – its own residents – but a court could not provide such relief (if it could provide that relief at all, *see supra*) in an APA action without "seriously disrupt[ing] the entire revenue collection process." *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1177 (5th Cir. 1993). A judgment in the plaintiffs' favor could only invite confusion and duplicative litigation over the availability of premium tax credits, given that absent parties could not be bound here. The APA does not permit such interference with the "administration and enforcement of the tax laws." *Id.* Consequently, the APA does not permit a suit by Indiana to declare what its residents' rights are under the Internal Revenue Code.

D. The Plaintiffs Must Proceed in the Forum that Congress Specified, an Action for a Tax Refund

The APA directs that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute," unless that proceeding is "inadequa[te]." 5 U.S.C. § 703; *see also* 5 U.S.C. § 704. Congress has specified the judicial remedy that the plaintiffs must pursue to challenge their potential liability

for the large employer tax: an action for a tax refund. Such an action provides the plaintiffs with an adequate remedy, and thus the plaintiff must bring their claims in a suit for a tax refund, not in this APA action. *See General Finance Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983); *Walsh v. Dep't of Veterans Affairs*, 400 F.3d 535, 537-38 (7th Cir. 2005).

The school districts argue that an action for a tax refund would not be adequate, because they would need to "violate the employer mandate" to bring such an action. School Corporations Opp. 11. They are simply wrong in their characterization of Section 4980H; the provision imposes a tax, not a legal obligation to offer health coverage. *See Nat'l Fed'n of Indep. Business v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2600 (2012) ("imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act"); *Liberty Univ. v. Lew*, 733 F.3d 72, 97-98 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013). There is no sense, then, in which the plaintiffs would be required to "violate the law" to pursue their tax refund action.[4] And in the field of tax law, it is well established that a refund action provides an adequate remedy at law, and that a taxpayer may not seek pre-enforcement review before a tax is assessed and collected. *See, e.g.*, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746 (1974); *Alexander v. Americans United Inc.*, 416 U.S. 752, 762 (1974).[5]

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[4] This case is accordingly unlike *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), as that case involved a challenge to an "independent regulatory mandate," not "a predicate to the imposition of a tax." *Id.* at 669.

[5] The school districts suggest that it might violate due process if they were required to bring their claims in a refund action. School Corporations Opp. 14. But any inconveniences that the plaintiffs might suffer from a deferral of review "do not rise to the level of constitutional infirmities, in light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference." *Bob Jones Univ.*, 416 U.S. at 747; *see also Lewin v. Commissioner*, 569 F.2d 444, 445 (7th Cir. 1978) (tax refund action is a "constitutionally adequate remedy"). In any event, the plaintiffs are not "persons" within the

The school districts also argue that the existence of the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, renders the limitations of 5 U.S.C. § 703 and 5 U.S.C. § 704 to be inapplicable for tax cases. School Corporations Opp. 12. Under their reasoning, Congress would not have enacted the AIA if it had believed that pre-enforcement review was already barred under the pre-existing principles of equity that are reflected in the APA. But this is flatly wrong:

> The Anti-Injunction Act was written against the background of general equitable principles disfavoring the issuance of federal injunctions against taxes, absent clear proof that available remedies at law were inadequate. . . . 'If the delay incident to [pursuing remedies at law] justified refusal to pay a tax, the federal rule that a suit in equity will not lie to restrain collection on the sole ground that the tax is illegal, could have little application. For possible delay of that character is the common incident of practically every contest over the validity of a federal tax.' Since equitable principles militating against the issuance of federal injunctions in tax cases *existed independently of the Anti-Injunction Act*, it is most unlikely that Congress would have chosen the stringent language of the Act if its purpose was merely to restate existing law and not to compel litigants to make use solely of the avenues of review opened by Congress.

Bob Jones Univ., 416 U.S. at 742 n.16 (quoting *California v. Latimer*, 305 U.S. 255, 261-262, (1938) (Brandeis, J.) (emphasis added). The AIA did not overrule the independent, background equitable principles that prohibit pre-enforcement tax challenges, then; it *strengthened* those principles by giving them jurisdictional force. *See Levin v. Commerce Energy, Inc.*, 560 U.S. at 432 (noting similar relationship between Tax Injunction Act and background equitable principle of comity, and holding that comity continued to bar suit even if TIA were inapplicable).

The APA provides both that a plaintiff must proceed under the form of proceeding that Congress has specified, *see* 5 U.S.C. §§ 703, 704, and that any suit must not run afoul of any limitations on judicial review found in other statutes, *see* 5 U.S.C. §§ 701(a)(1), 702(1). These

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meaning of the Fifth Amendment's Due Process Clause. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966).

limitations in the APA apply independently. *See Cohen v. United States*, 650 F.3d 717, 731 (D.C. Cir. 2011) (separately addressing each limitation). For the reasons explained in this section, the complaint should be dismissed because the plaintiffs are obligated to pursue their claim in the forum that Congress chose, not in this APA action. (The defendants also contend that the AIA operates as an independent barrier, with jurisdictional force, prohibiting pre-enforcement challenges to the Section 4980H tax, but acknowledge that Circuit precedent is to the contrary on this point.)

II. The Plaintiffs May Not Relitigate Their Constitutional Challenges to the ACA (Counts II through IV)

In addition to their attempt to preclude Indiana residents from receiving valuable federal tax credits, the plaintiffs also seek to revive the constitutional challenge to the ACA that Indiana unsuccessfully pursued in the *Florida* litigation. They assert that the large employer tax, 26 U.S.C. § 4980H, violates the Tenth Amendment insofar as it is applied to state employers (Count II); that the information reporting requirement for large employers, 26 U.S.C. § 6056, likewise violates the Tenth Amendment insofar as it is applied to state employers (Count III); and that, if they prevail in Count III, additional provisions of the ACA would be non-severable from Section 6056 and so would fall as well (Count IV). In their motion to dismiss, the defendants showed that these claims fail under principles of claim and issue preclusion, and that these claims fail on the merits as well. The plaintiffs respond inadequately to the first point, and not at all to the second.

A. The Constitutional Challenges Fail on the Merits, and the Plaintiffs Have Waived Any Argument to the Contrary

The defendants moved to dismiss Counts II through IV both because the plaintiffs are estopped from bringing these claims under principles of claim and issue preclusion, and because those claims fail on the merits. *See* Defs.' Mem. in Supp. of Mot. to Dismiss Am. Compl. 31-32, ECF 37. As the defendants showed, neither Section 4980H nor Section 6056 violates the Tenth Amendment, because those provisions regulate the states' activities as employers, on terms that are generally applicable to all large employers. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985); *see also Reno v. Condon*, 528 U.S. 141, 150-51 (2000); *Travis v. Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998). For the same reason, neither provision violates the intergovernmental tax immunity doctrine. *See South Carolina v. Baker*, 485 U.S. 505, 525 n.15 (1988).

The plaintiffs had the opportunity to defend the merits of their Tenth Amendment claims in their oppositions to the motion to dismiss, but both sets of plaintiffs chose to forgo that opportunity. Their claims accordingly are waived. "'[W]hen presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action.'" *Potter v. ICI Americas Inc.*, 103 F. Supp. 2d 1062, 1072 (S.D. Ind. 1999) (quoting *Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1335 (7th Cir. 1995)). *See also Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1075 (7th Cir. 2013) (claims were waived because party "failed to respond to the City's arguments against these claims in their reply to the City's motion to dismiss"); *Johnson v. United States*, 47 F. Supp. 2d 1075, 1079-80 (S.D. Ind. 1999).[6]

[6] Res judicata is "not a jurisdictional issue." *Republican Nat'l Comm v. FEC*, 698 F. Supp. 2d 150, 163 n.7 (D.D.C. 2010) (three-judge panel), *aff'd*, 130 S. Ct. 3544 (2010). This

B. The Constitutional Challenges Fail Under Principles of Claim and Issue Preclusion

In any event, the plaintiffs' constitutional claims are barred. The State of Indiana sought the invalidation of Section 4980H and Section 6056 in prior litigation, and it failed on the merits. As the defendants showed in their motion to dismiss, principles of claim preclusion and issue preclusion prevent Indiana from relitigating the same claim here. The school districts are also barred from litigating those claims again, as they are in privity with Indiana for the purposes of any assertion of Tenth Amendment immunity from regulation.

Indiana raises a host of arguments in an attempt to justify its attempt to relitigate these claims; none of these arguments is availing. It asserts that it should not be precluded from bringing the same claim again, because there have been "changes in constitutional law" since 2010. Indiana Opp. 26. But "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981). Any exception to this principle is exceedingly narrow; "changes in case law almost never provide a justification for instituting a new action arising from the same dispute that already has been litigated to a final judgment." *Alvear-Velez v. Mukasey*, 540 F.3d 672, 678 (7th Cir. 2008).

Court accordingly may treat Counts II through IV as waived, and dismiss those counts on the merits, before reaching the questions of claim and issue preclusion. Indiana cites *RNC* for the proposition that res judicata does not prevent repeated challenges to "large statutes" like the ACA, Indiana Opp. 24, but that case did not reject the application of res judicata. Rather, the court simply held that it need not reach the issue, because it had already rejected the plaintiffs' claims on the merits.

In the absence of a "clear change of constitutional doctrine, ordinary claim-preclusion principles apply." 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4415 at 96 n.44 (April 2013 Supp.).

Indiana does not contend that there has been any "clear change" in the doctrine governing its Tenth Amendment claim. Nor could it so contend, since the Supreme Court denied its petition for a writ of certiorari with respect to this claim in the *NFIB* litigation. Indiana's argument instead is that *NFIB* "raises new doubts" as to whether *Garcia* remains good law. Indiana Opp. 28. Indiana's "doubts" as to the validity of its claim, however, are insufficient to overcome the res judicata effect of the litigation that it participated in less than two years ago.

Indiana also argues that claim preclusion and issue preclusion should not apply against it because it was "not possible" for it to challenge Sections 4980H and Section 6056 as exercises of the taxing power in the prior litigation. Indiana Opp. 27. Not only was it "possible" for Indiana to do so, it actually did assert such a challenge. *See* Pls.' Mem. in Opp. to Mot. to Dismiss at 58-60, *State of Florida, et al. v. U.S. Dep't of Health & Human Servs., et al.*, No. 3:10-cv-00091-RV-EMT (N.D. Fla. filed Aug. 6, 2010) (asserting violation of principle of intergovernmental tax immunity); *Florida v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1154 n.14 (N.D. Fla. 2010), *rev'd in part on other grounds by NFIB* (rejecting this claim as waived and, alternatively, on the merits).[7] *Cf. Ass'n of Am. Physicians & Surgeons v. Sebelius*, --- F.3d ---, 2014 WL 888441, at *2 (D.C. Cir. Mar. 7, 2014) ("the briefing in *NFIB*

[7] The district court in *Florida* squarely rejected Indiana's intergovernmental tax immunity theory on the merits. Indiana asserts that issue preclusion should not apply with respect to its intergovernmental tax immunity theory, because that theory "was never squarely before" the *Florida* court. Indiana Opp. 31. This assertion is belied by that court's opinion, which directly rejected the intergovernmental tax immunity argument on the merits. 716 F. Supp. 2d at 1154 n.14.

and the lower court decisions reviewed in *NFIB*, long before the decision issued, clearly raised the possibility that § 5000A would be sustained as a tax").

Indiana further argues that there have been "factual changes" that justify relitigation of its claims, because it (allegedly) can now describe "specific injuries" that it would suffer from the large employer tax. Indiana Opp. 26. But nothing prevented Indiana from describing those purported injuries before, and in any event nothing in its description of those injuries is material to the merits of the Tenth Amendment claim. *See Montana v. United States*, 440 U.S. 147, 159 (1979) ("changes in facts *essential to a judgment* will render collateral estoppel inapplicable in a subsequent action raising the same issues") (emphasis added).

Finally, Indiana argues that its challenge to the reporting requirements in Section 6056 should survive, even if its challenge to Section 4980H fails, because the reporting provision was not at issue in the *Florida* litigation. Indiana Opp. 30. This is not so. Indiana, and the other state plaintiffs, argued that the ACA was unconstitutional because, in their view, "[n]ew tax reporting requirements prescribed by the Act also will burden the Plaintiff States' ability to source goods and services as necessary to carry out governmental functions." Am. Compl., ¶ 48, *State of Florida, et al. v. U.S. Dep't of Health & Human Servs., et al.*, No. 3:10-cv-00091-RV-EMT (N.D. Fla. filed May 14, 2010). The only "tax reporting" provision to which Indiana could have referred is Section 6056. Further, the states sought the complete invalidation of the ACA as the remedy for the Act's supposed Tenth Amendment violations. *See id.*, p. 30. "[J]udgments are conclusive not only with respect to arguments actually made, but also with respect to arguments that could have been made," *United States v. County of Cook*, 167 F.3d 381, 383 (7th Cir. 1999), and so Indiana's challenge to Section 6056 is barred as well.

For their part, the school districts contend that they are not in privity with the State of Indiana, and so their claims should survive even if Indiana's do not. For the purposes of any Tenth Amendment claim that the school districts mean to bring, however, their "rights, if any, derive from those of the [state]," and so they "also [are] bound by the prior determination" against the state. *Board of Elec. Light Comm'rs of City of Burlington v. McCarren*, 725 F.2d 176, 178 (2d Cir. 1983) (binding municipality to judgment against state agency).

The school districts dispute this principle, asserting without explanation that their "rights here do not derive from those of the state." School Corporations Opp. 19. This is plainly wrong:

> As the denomination "political subdivision" implies, the local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself.

Nat'l League of Cities v. Usery, 426 U.S. 833, 855 n.20 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Under *Garcia*, of course, the school districts (like Indiana) have no Tenth Amendment claim of immunity from generally applicable regulation. But even under the pre-*Garcia* state of the law to which the plaintiffs wish to return, the only reason that the school districts could assert a Tenth Amendment claim is because they "derive their authority and power from their respective States." The school districts cannot derive any greater power to resist federal regulation than Indiana itself has, and so their claims are barred to the same extent that Indiana's are.[8]

[8] The school districts also assert that they are not in privity with Indiana because they have independent powers, and are separately represented. School Corporations Opp. 16. This

In sum, the *Florida* litigation was not a practice run. That case, instead, was Indiana's opportunity to persuade a court that it was entitled under the Tenth Amendment to immunity from generally applicable federal regulation. It failed on that claim, on the merits, and it is bound by that result.

III. There Is No Case or Controversy with Respect to the Plaintiffs' 2014 Liability for the Large Employer Tax (Count V)

The Internal Revenue Code affords the Secretary of the Treasury the authority to "prescribe all needful rules and regulations for the enforcement of" the Code, "including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." 26 U.S.C. § 7805(a). Treasury exercised this authority to determine that the Section 4980H tax assessment and the Section 6056 reporting requirement will not begin to be applied until 2015. *See* Notice 2013-45, 2013-31 I.R.B. 116. In Count V of the amended complaint, the plaintiffs seek what they call a declaration of "judicial estoppel" that would bind the defendants to this determination. As the defendants have shown in their motion to dismiss, this claim does not state a case or controversy, as all parties are in agreement that neither Section 4980H nor Section 6056 will be applied for 2014. *See, e.g.*, *Lawson v. Hill*, 368 F.3d 955, 957 (7th Cir. 2004) ("Article III of the Constitution bars a federal court from enjoining threatened action that the plaintiff has no reason to suppose even remotely likely ever to materialize.").

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is beside the point. The question of privity "is a functional inquiry in which the formalities of legal relationships provide clues but not solutions." *Tice v. American Airlines, Inc.*, 162 F.3d 966, 971 (7th Cir. 1998) (internal quotation omitted). The school districts and Indiana may very well not be in privity with each other for the purposes of other types of claims that are not at issue here. But where the school districts assert that they are immune from federal regulation under the Tenth Amendment because they share in the sovereign powers of the State of Indiana, they are in privity with the state for the purposes of that constitutional claim. *See Board of Elec. Light Comm'rs of City of Burlington*, 725 F.2d at 178.

Indiana disputes this point, reasoning that, because "no source of law" has indicated that it will not be liable for the employer tax for 2014, it therefore is entitled to a declaration to that effect from this Court. Indiana Opp. 32. It acknowledges that Treasury has published a final rule with respect to Section 4980H, but it asserts that those final regulations "[do] not codify the administration's statements concerning non-enforcement for 2014." Indiana Opp. 33. Its characterization of the final rule is incorrect; the rule reiterates, several times over, that the large employer tax will not be applied for 2014. *See* 79 Fed. Reg. 8544, 8544 (Feb. 12, 2014) (reciting transition relief for 2014 provided in Notice 2013-45); *id.* at 8545 ("no assessable payments under section 4980H will apply for 2014"); *id.* at 8569 (same); *id.* at 8570 (large employer tax and reporting provisions "will become effective for 2015"); *id.* at 8577 (reciting transition relief for 2014 provided in Notice 2013-45). The final rule accordingly establishes that they are "applicable for periods after December 31, 2014." 26 C.F.R. §§ 54.4980H-1(b); 54.4980H-2(f); 54.4980H-3(i); 54.4980H-4(h); 54.4980H-5(g).

Treasury also has published a final rule with respect to large employers' information reporting obligations under Section 6056, and that rule likewise reiterates that those reporting obligations will not apply for 2014: "Notice 2013-45 provides transition relief for 2014 for section 6056 reporting requirements which, given their role in administering section 4980H, means that no payments will be assessed under section 4980H for 2014." 79 Fed. Reg. 13,231, 13,233 (Mar. 10, 2014). *See also id.* at 13,232 ("reporting is not required with respect to 2014"); *id.* at 13,233 (same); *id.* at 13,238 (same); *id.* at 13,246 (same). The effective date for the regulations under Section 6056, accordingly, is also established as 2015. 26 C.F.R. §§ 301.6056-1(m); 301.6056-2(b).

Despite Treasury's repeated assurances that neither the large employer tax nor the information reporting provisions for large employers will be applied for 2014, Indiana asserts that it still has standing because the "statutory text alone implies a sufficient threat of enforcement." Indiana Opp. 33. In support of this proposition, Indiana cites *Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003), a First Amendment speech case. But outside of the context of the First Amendment – where special considerations apply, due to concerns about the chilling effect of restrictions on speech – "[t]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). And even in the context of First Amendment cases (which this case is not), there is no credible threat of enforcement – and thus no injury giving rise to standing – if "the Government [indicates] affirmatively that it will not enforce the statute." *Commodity Trend Serv., Inc. v. CFTC*, 149 F.3d 679, 687 (7th Cir. 1998); *see also Lawson v. Hill*, 368 F.3d at 957.

Here, Treasury has made multiple representations that it has provided transition relief from Section 4980H and Section 6056 for large employers for 2014. The recently published final rules repeat these assurances *seventeen* times. Indiana lacks standing to ask this Court to order Treasury to give an eighteenth assurance to the same effect. *See Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1403 (7th Cir. 1993) (allegation that defendant "might someday enforce" a rule against the plaintiff does not state a case or controversy, because "federal courts lack the power to give advisory opinions in hypothetical cases"). Count V, accordingly, should be dismissed for the absence of a case or controversy.

Conclusion

For the foregoing reasons, the defendants respectfully request that the complaint be dismissed for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rule of Civil Procedure and for failure to state a claim pursuant to Rule 12(b)(6) of those rules.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2014, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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